A

SHAMEER SDN BHD

v.

INTER-CULTURAL LANGUAGE SCHOOL (M) SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NO: R3-12B-817-2010]
15 OCTOBER 2010

C

LANDLORD AND TENANT: *Agreement - Construction - Absence of term for mode of handing over vacant possession - Whether tenant's solicitor could hold keys to premises for onward transfer to landlord - Whether accepted mode*

D

LANDLORD AND TENANT: *Determination - Double rent - Claim for - Failure to deliver vacant possession - Whether entitled as of right - Whether there was holding over by tenant - Whether delay in getting vacant possession of premises attributable to landlord - Whether landlord's failure to mitigate losses negated claim for damages and double rental*

E

The appellant/plaintiff and the respondent/defendant entered into a tenancy agreement whereby the appellant rented the third floor to the respondent for a period of two years. On expiry of the tenancy on 10 October 2006 and upon the request by the

F

respondent, the appellant agreed that the vacant possession of the third floor be delivered on 10 January 2007. The respondent surrendered the keys to the third floor to their solicitors to be collected by the appellant on 31 January 2007. However, the appellant failed to collect the keys until 11 June 2007. The

G

appellant alleged that the third floor was in a deplorable condition and contended that the respondent was therefore deemed to have delivered vacant possession only after the premises was repaired and was in a tenantable condition. As regard the second floor, the appellant entered into a sale and purchase agreement with the

H

respondent to purchase the second floor and paid the full purchase price on 22 November 2006. The respondent promised to deliver vacant possession on 25 January 2007 and the appellant was duly notified by the respondent's solicitor to collect the keys on 31 January 2007. However, as in the case of the third floor,

I

the keys to the second floor were also collected only on 11 June

2007. The appellant again raised the issue that the second floor was also in a deplorable condition which required repairs and thus the respondent was deemed to have delivered vacant possession upon the repair. The appellant's claim was for, *inter alia*, double rental for the second and third floors, cost of replacing nine units of air conditioner, cost of repairs and replacement for the second and third floors and adjuster's fee totalling to the sum of RM167,997. The respondent on the other hand counter-claimed for the refund of utility deposit in the sum of RM7,000. The Sessions Court Judge allowed a nominal damages of RM500 on the grounds that the claim had not been met and allowed the respondent's counter-claim for RM7,000.

Held (dismissing respondent's counter-claim with costs; affirming decision of Sessions Court):

(1) A landlord is not entitled as of right to double rental in every case of delay in handing over of vacant possession. In order to claim for the remedy, the appellant must prove there was a holding over by the tenant; *Mari Boutique Sdn Bhd v. Jaya Jusco Stores Bhd* (refd). (para 7)

(2) The rights and liabilities of parties who have entered into a written contract had to be determined within the four corners of the agreement. The tenancy agreement, on the facts, was silent on the mode of handing over vacant possession. In the circumstances, it was not wrong if the keys to the premises were held by the respondent's solicitors for onward transfer to the appellant as this was an accepted mode of handing vacant possession. (paras 8 & 9)

(3) The date of handing over the keys of the premises was crucial because the appellant's claim for double rental was founded on the ground of delay in handing over the premises. The appellant sought to intertwine delay in handing vacant possession and damage caused to the premises. The court must give the words "please come and collect the keys on or before 31 January 2007" its ordinary and natural meaning, *ie*, the tenant was no longer occupying the premises and that the premises were now vacant. Hence, the actual date the keys and vacant possession of both the third and second floors were delivered was on 31 January 2007. Further, the fact that the appellant agreed to collect the keys subsequently showed that they had accepted the mode of handing over vacant possession. (para 9)

A **(4)** They keys were only collected by the appellant on 11 June 2007 although the appellant was told to collect them on 31 January 2007. In absence of any valid reason for the appellant's refusal to collect the keys from the respondent's solicitors, the cause of the delay in getting vacant possession
B of the premises was attributable to the appellant. Hence, the delay being inordinate and justified, and the appellant having failed to mitigate the losses, could not rely on their own inaction to claim damages against the respondent. In the circumstances, the claim for double rental for both the second
C and third floors must fail. (paras 11 & 12)

(5) The appellant was not entitled to rely under s. 28(4)(a) of the Civil Law Act 1956 as this was not a case of the tenancy being terminated. Instead, this was a case of the tenancy
D which had expired but mutually extended for three months by the parties. (para 11)

(6) The claim for cost of repairs was rejected as the amount claimed was only an estimate and not the actual cost incurred to repair. There was no receipt or invoice to support the claim
E and it was also the findings of the trial judge that the photographs relied upon by the appellant were marked as IDs only and was rejected by the court. Hence, there was no reason for the court to interfere with the findings. (para 13)

F **(7)** The appellant purchased the second floor on an "as is where is basis" and thus the appellant had to accept the fact that there were no air-conditioners in the second floor. The claim was dismissed on the ground that the document relied upon by the appellant was only a quotation which was marked as
G ID only and hence it was rightfully rejected. (para 14)

(8) In view of the overwhelming evidence by the appellant of the respondent's breach of the tenancy agreement, in particular damage done to the premises as a result of the respondent's
H act in taking out electricity appliances, the appellant had established the various breaches committed by the respondent. As such, the appellant was entitled to forfeit only the security deposit of RM6,000. The utility deposit of RM1,000 should be refunded to the respondent. (para 15)

I

Case(s) referred to:
Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd [1982] 1 LNS 69 FC ***(refd)***
Mari Boutique Sdn Bhd v. Jaya Jusco Stores Bhd [2003] 4 CLJ 848 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28(4)(a)

For the appellant - S Sivanesan; M/s Sumathi Shanmugam & Co
For the respondent - LH Chua; M/s LH Chua

Reported by S Barathi

JUDGMENT

Hadhariah Syed Ismail JC:

Introduction

[1] This is a dispute between a landlord/owner of a premises and its tenant. Out of the sum RM167,997 claimed by the appellant/plaintiff, the learned Sessions Judge only allowed a nominal damages of RM500 on the ground the claim have not been met. Instead, the trial judge allowed with cost the respondent's/defendant's counter-claim for RM7,000. The appellant appealed against the said judgment.

The Appellant's Claim

[2] The prayers asked for in the statement of claim are:

(i) Double rental for eight months from 11 January 2007 to 31 August 2007 at the rate of RM7,000 per month for the 3rd floor, totaling RM56,000;

(ii) Double rental for seven months from 1 February 2007 to 31 August 2007 at the rate of RM7,000 per month for the 2nd floor, totaling RM49,000;

(iii) Estimated cost of replacing nine units of air-conditioner in the sum of RM22,500;

(iv) Adjusters fee in the sum of RM4,097;

(v) Cost of repairs and replacement for the 2nd and 3rd floors in the sum of RM37,400.

A **The Respondent's Counter-claim**

[3] The respondent counter-claimed for the refund of utility deposit in the sum of RM7,000.

B **Background Facts**

[4] The appellant is the owner of a premise known as Lot D3, Block D, 3rd Floor Kuala Lumpur Plaza. Pursuant to a written tenancy agreement dated 11 October 2004, the appellant rented the 3rd floor to the respondent at a monthly rental of RM3,500. C The tenancy is for a period of two years. On the expiry of the tenancy on 10 October 2006, upon the request of the respondent, the appellant agreed vacant possession of the 3rd floor is to be delivered on 10 January 2007. The keys to the 3rd floor was surrendered by the respondent to their solicitors and to be D collected by the appellant on 31 January 2007. There were numerous correspondences between the parties asking the appellant to collect the keys. But for some reasons, the appellant failed to collect it until 11 June 2007 when the appellant's representative collected the keys from the respondent. By then, E there was a delay of five months. This fact was admitted by the appellant. What happened subsequent thereto is this. The appellant alleged that the 3rd floor was in a deplorable condition with electricity being disconnected. The appellant had to engage an independent contractor to repair the 3rd floor. The repair work F was completed sometime in August 2007. The appellant contended only after the repair was made good and the premises was in a tenantable condition, the respondent was deemed to have delivered vacant possession to the appellant and that date is on 31 August 2007. That explained how the appellant claimed double G rental for eight months from 11 January 2007 to 31 August 2007.

[5] With regards to the 2nd floor, on 12 October 2006, the appellant had entered into a sale and purchase agreement with the respondent for the purchase of the 2nd floor with vacant H possession agreed to be delivered upon receiving the full purchase price. The appellant had paid the full purchase price of the 2nd floor on 22 November 2006. Therefore, pursuant to the terms in the sale and purchase agreement, the respondent is deemed to have delivered vacant possession on 22 November 2006. In their I letter of 21 December 2006, the respondent promised to deliver vacant possession on 25 January 2007. It had to be pointed out

that the respondent's solicitors had wrote a letter to the appellant to collect the keys on 31 January 2007. The keys was collected on 11 June 2007. As is the case of 3rd floor, the 2nd floor also was in deplorable conditions that required repairs to be done. The 2nd floor was completely repaired sometime in August 2007. Only after the 2nd floor was in tenantable condition, the respondent is deemed to have delivered vacant possession. Here also, the appellant is claiming for double rental from 1 February 2007 to 31 August 2007.

Grounds Of Appeal

[6] The learned Sessions Judge is said to have erred in law and in facts in the following issues:

(a) Having found in favour of the appellant that there is a breach on the part of the respondent in delivering vacant possession of the two units of the property to the appellant, the learned judge only granted a nominal damages of RM500;

(b) Placing a great burden on the appellant to collect the keys to the premises from the respondent's solicitors but not taking into considerations of the issues raised by the appellant in their letters of 5 February 2007, 22 March 2007, 23 March 2007, 31 May 2007 and 1 June 2007 to the respondent;

(c) Failing to determine the actual date the keys and vacant possession of the 3rd and 2nd floors was actually delivered to the appellant.

Claim For Double Rental For The 2nd And 3rd Floor

[7] Section 28(4)(a) of the Civil Law Act 1956 allows a claim for double rental whenever there was a holding over by a tenant after his tenancy has been terminated. Previous decided cases seems to establish that a landlord is not entitled as of right to double rental in every case of delay in handing over of vacant possession. In order to claim for this remedy, the appellant must prove there was a holding over by the tenant. In *Mari Boutique Sdn Bhd v. Jaya Jusco Stores Bhd* [2003] 4 CLJ 848, Abdull Hamid Embong (now FCJ) has held that the recovery of double rent under s. 28(4)(a) is thus not as of right for the landlord but a matter of the court's discretion. The same view was adopted by the Federal Court in *Krishna Sreedhara Panicka v. Chiam Soh Yong Realty Co Ltd* [1982] 1 LNS 69.

A **[8]** It has been repeated many times that when parties have entered into a written contract, their rights and liabilities had to be determined within the four corners of the agreement. With regard to the 3rd floor, reference had to be made to the tenancy agreement. The claim for double rental is premised on the failure
B of the respondent to deliver vacant possession on the respective due dates. Two issues arose on the claim for double rental. These are:

(a) was there a delay in handing over of vacant possession to 31
C August 2007?

(b) what constitutes delivery of vacant possession. Was it sufficient with handing over of the keys or does it means the premises had to be made good and in tenantable condition before vacant possession could be said to have been delivered?

D

[9] I notice the tenancy agreement is silent on the mode of handing over vacant possession. That being the case, I find there is nothing wrong if the keys to the premises were held by the respondent's solicitors for onward transfer to the appellant. This
E is an accepted mode of handing over vacant possession. Counsel for the appellant sought to make an issue in saying there is a difference between handing over of keys and handing over vacant possession of a premises in a tenantable condition. I had to disagree with the appellant's contention. The date of handing over
F the keys of the premises is crucial because the appellant's claim for double rental is founded on the ground of delay in handing over the premises. The appellant sought to intertwine delay in handing vacant possession and damage caused to the premises. I was of the view that once the tenant says "please come and
G collect the keys on or before 31 January 2007", the court must give those words its ordinary and natural meaning, ie, the tenant no longer occupying the premises, that the premises is now vacant for you as the landlord to take over. This means the actual date the keys and vacant possession of both 3rd and 2nd floors were
H delivered on 31 January 2007. The fact that the appellant agreed to collect the keys subsequently showed they had accepted the mode of handing over vacant possession.

I

[10] The next question which was rightly asked by the Sessions Judge is why did the appellant take the keys only on 11 June 2007, some four months later? The appellant, through their witness (PW1) gave two reasons: A

(i) the keys could not be collected before 31 January 2007 because it was a public holiday; and B

(ii) it is useless to collect the keys when they cannot enter the premises as it was in a mess and pitch dark inside.

[11] Needless to say both the reasons were rejected by the trial judge. The trial judge was perfectly right in her findings on this issue. With no valid reason for their refusal to collect the keys from the respondent's solicitors, the cause of the delay in getting vacant possession of the premises is attributable to the appellant. The appellant only had themselves to blame for the delay. On the facts of this case, I was of the view that the appellant is not entitled to rely under s. 28(4)(a) as this is not a case of the tenancy had been terminated. Instead this is a case of a tenancy which has expired, but mutually extended for three months by the parties to 10 January 2007. Even holding over was a non starter in this case to activate s. 28(4)(a) into operation. What has been established is the respondent did not owe any rental during those three months extension. The only fault of the respondent is instead of handing over the keys on 10 January 2007 as promised, they have asked the appellant to collect the key on 31 January 2007. Thus there was a delay of 21 days in delivering vacant possession. In that respect, the trial judge was right to award a nominal damages of RM500. C D E F

[12] With regards to the claim for double rental for the 2nd floor, I would say it was the appellant's failure to collect the keys that led to the delay in them taking vacant possession of the premises. Delay from January 2007 to June 2007 is inordinate and unjustified. It is a clear case of the appellant having failed to mitigate their losses. There was no landlord-tenant relationship between the parties to justify the claim for double rental. The appellant's remedy, if any, is restricted under the sale and purchase agreement. Further it was the appellant's fault in delaying to collect the keys. The appellant cannot rely on their own inaction to claim damages against the respondent. On those grounds, the claim for double rental for both 2nd and 3rd floors must fail. G H I

A **Claim For Repairs And Replacement Costs For Both Floors**

[13] Under this heading, the appellant is claiming for cost of repairs in the sum of RM18,700 for each floor, making the total sum claimed is RM37,400. The appellant relied on the adjuster's
B report appointed by them. This claim was rejected because the amount claimed is only an estimate and not the actual cost incurred to repair. The courts find there was no receipt or invoice to support the claim. Further, it was also the findings of the trial judge that the photographs relied upon by the appellant were
C marked as IDs only and was rejected by the court. Again the findings of the trial judge is supported by the evidence before the court. There is no reason for me to interfere with the findings so made.

D **Claim For Removal Of Nine Units Aircond**

[14] The appellant contended the airconds belong to them as they are fittings as mentioned under cl. 5.2(1) in the tenancy agreement. But there was no inventory list prepared and attached to both the tenancy agreement and sale and purchase agreement.
E So it is the appellant's words against that of the respondent. But one thing is certain and that is the appellant do not know the condition of the 2nd floor prior to taking over vacant possession. The respondent, on the other hand say they had every right to take away the airconds as it belong to them. As the appellant
F purchased the 2nd floor on "as is where is basis", I was of the view that the appellant had to accept the fact there were no airconds in the 2nd floor. The trial judge did not make a finding to whom does the airconds belongs to. But the claim was dismissed not on the ground the appellant is not the owner of the
G airconds, but simply on the ground the document relied upon by the appellant is only a quotation which was marked as ID only. In the circumstances, the claim was rightfully rejected by the court.

H **Respondent's Counter-Claim**

[15] It is not disputed that the respondent had paid utility deposit of RM1,000 and security deposit of RM6,000. It is an admitted fact that there was no outstanding utility bill and the
I appellant agreed they should refund this RM1,000 to the respondent and it was not forfeited. The appellant only forfeited

RM6,000 because the respondent had misused the premises as well as the various breaches committed by the respondent. In view of the overwhelming evidence by the appellant of the respondent's breach of the tenancy agreement, in particular damage done to the premises as a result of the respondent's act in taking out electricity appliances, I was of the opinion that the appellant had established the various breaches committed by the respondent. As such, the appellant is entitled to forfeit the security deposit of RM6,000. Therefore, only the utility deposit of RM1,000 should be refunded to the respondent.

Decision

[16] This is a case where the trial judge had identified the issues and applied the correct law. Except there was an error in allowing the respondent's counter-claim, I had no reason to interfere with the findings made by the trial judge. I therefore allow the appeal to the extent the respondent's counter-claim is dismissed with cost. The judgment of the Sessions Judge on the appellant's claim is affirmed.